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NOTES

NLRA PREEMPTION OF STATE UNEMPLOYMENT COMPENSATION LAW PROVIDING BENEFITS FOR STRIKERS—*NEW YORK TELEPHONE CO. V. NEW YORK STATE DEPARTMENT OF LABOR*

The temporary payment of unemployment compensation benefits is provided for by law in each state.[1] These laws are similar in many respects because federal law requires that the statutes of each state be drawn to meet certain requirements,[2] and state legislatures often have merely adopted the unemployment compensation "draft bills"[3] prepared by the Social Security Board.[4] Federal law, however, does not impose any requirement regarding the payment of unemployment compensation to strikers. Consequently, a few states allow strikers in some circumstances to receive unemployment compensation benefits,[5] although the large majority of states specifically provide that persons whose unemployment is caused by participation in a strike are not eligible at any time for such benefits.[6]

1. D. NELSON, UNEMPLOYMENT INSURANCE 190 (1969); Haggart, *Unemployment Compensation During Labor Disputes*, 37 NEB. L. REV. 668, 670 (1958) [hereinafter cited as Haggart].

2. These requirements are set forth at 26 U.S.C. § 3304 (1976) and 42 U.S.C. § 503 (1976).

3. SOCIAL SECURITY BOARD, DRAFT BILLS FOR STATE UNEMPLOYMENT COMPENSATION OF THE POOLED FUND AND EMPLOYER RESERVE ACCOUNT TYPES (rev. ed. 1937) [hereinafter cited as DRAFT BILLS].

4. Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. CHI. L. REV. 294, 294 (1950) [hereinafter cited as Shadur].

5. For example, some states disqualify strikers only if the labor dispute results in a "stoppage of work" at the employer's establishment. *See, e.g.*, DEL. CODE ANN. tit. 19, § 3315(4) (1974); HAW. REV. STAT. § 383-30(4) (1976); N.M. REV. STAT. § 51-1-7(D) (1978). Other states permit strikers to receive benefits if they have been laid off from a subsequent job. *See, e.g.*, ME. REV. STAT. tit. 26, § 1193(4)(C) (Supp. 1978); MICH. COMP. LAWS ANN. § 421.29(8) (1978). New Hampshire disqualifies strikers unless the strike which caused the unemployment resulted from the employer's violation of a collective bargaining agreement. N.H. REV. STAT. ANN. § 282:4(F)(3) (1977). Maine allows strikers to receive benefits if they are protesting hazardous conditions at their place of employment. ME. REV. STAT. tit. 26, § 1193(4)(D) (Supp. 1978). New York, N.Y. LABOR LAW § 592.1 (McKinney 1977), and Rhode Island, R.I. GEN. LAWS § 28-44-16 (1968), disqualify strikers from receiving benefits for eight and seven weeks respectively, after which time the disqualification is removed. Montana, MONT. REV. CODES ANN. § 87-106(d)(2) (Supp. 1977), and Utah, UTAH CODE ANN. § 35-4-5(d)(1) (1953), disqualify strikers unless the strike results from the employer's violation of a state or federal labor relations or wage-hour law.

6. A typical provision is that of Illinois:

> An individual shall be ineligible for benefits for any week with respect to which it is found that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed. . . . This Section shall not apply if it is shown that (A) the individual is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work and (B) he does not belong to a grade or class of workers of which immediately before the commencement of the stoppage of work there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute; provided, that a lockout by the employer or the individual's failure to

Recently there have been challenges[7] to some of the state statutes which authorize the payment of unemployment compensation to strikers, on the ground that such payments disrupt the federal policy of free collective bargaining expressed in the National Labor Relations Act[8] (NLRA) and the Labor Management Relations Act[9] (LMRA) and are thus void under the supremacy clause of the United States Constitution.[10] Federal courts hearing these challenges have disagreed as to whether the statutes are preempted by federal law.[11] The United States Supreme Court granted

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cross a picket line at such factory, establishment, or other premises shall not, in itself, be deemed a participation by him in the labor dispute. . . .

ILL. REV. STAT. ch. 48, § 434 (1977).

7. *See* New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979) (challenging New York's statute); Grinnell Corp. v. Hackett, 475 F.2d 449 (1st Cir.) (challenging Rhode Island's statute), *cert. denied*, 414 U.S. 858 (1973); Dow Chemical Co. v. Taylor, 428 F. Supp. 86 (E.D. Mich. 1977) (challenging Michigan's statute); Hawaiian Tel. Co. v. Hawaii Dep't of Labor & Indus. Relations, 405 F. Supp. 275 (D. Hawaii 1976) (challenging Hawaii's statute), *cert. denied*, 435 U.S. 943 (1978); Kimbell v. Employment Security Comm'n of N.M., No. 10323 (N.M. Sup. Ct. Dec. 29, 1975) (challenging New Mexico's statute), *appeal dismissed*, 429 U.S. 806 (1976). *See also* cases cited in Petitioner's Brief for Certiorari at 15, New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979).

8. National Labor Relations Act §§ 1-19, 29 U.S.C. §§ 151-169 (1976) [hereinafter cited as NLRA].

9. Labor Management Relations Act §§ 1-503, 29 U.S.C. §§ 141-188 (1976) [hereinafter cited as LMRA].

10. U.S. CONST. art. VI, para. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding.

The supremacy clause applies because Congress has the authority to regulate labor relations. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (the regulation of labor relations falls under the commerce clause of the constitution).

11. Two federal district courts have held that statutes which authorize the payment of unemployment compensation to strikers are preempted. New York Tel. Co. v. New York State Dep't of Labor, 434 F. Supp. 810 (S.D.N.Y. 1977), *rev'd*, 566 F.2d 388 (2d Cir. 1977), *aff'd*, 440 U.S. 519 (1979); Hawaiian Tel. Co. v. Hawaii Dep't of Labor & Indus. Relations, 405 F. Supp. 275 (D. Hawaii 1976), *cert. denied*, 435 U.S. 943 (1978). Evidencing an agreement with these district courts that such state laws are preempted, the first circuit in Grinnell Corp. v. Hackett, 475 F.2d 449 (1st Cir.), *cert. denied*, 414 U.S. 858 (1973), reversed the District Court of Rhode Island's dismissal of a preemption challenge to that state's unemployment compensation statute for failure to state a claim. Grinnell Corp. v. Hackett, 344 F. Supp. 749 (D.R.I. 1972). The first circuit determined that Congress had not unmistakably manifested its intent regarding preemption of state laws which pay benefits to strikers, and that it therefore could not rule categorically that no evidence could be produced which would establish that Rhode Island's law substantially disturbs the collective bargaining process. Grinnell Corp. v. Hackett, 475 F.2d 449, 453 (1st Cir. 1973).

Similarly, the district court in Dow Chemical Co. v. Taylor, 428 F. Supp. 86 (E.D. Mich. 1977), held that summary judgment should not be granted to defendants in a preemption challenge to Michigan's unemployment compensation law because there was a factual issue as to whether the degree of impact of the payment of benefits to strikers was so great that the operation of Michigan's statute frustrated federal labor policy. *Id.* at 91.

certiorari[12] in one of these cases, *New York Telephone Co. v. New York State Department of Labor*,[13] no doubt because of the differences between the federal courts,[14] the fact that fourteen similar cases were pending before federal courts at the time petitioners applied for certiorari,[15] and the importance of the preemption question to unions and employers.

The Supreme Court affirmed the decision of the appellate court holding that New York's unemployment compensation law is not preempted by the statutory policy expressed by Congress in the NLRA and LMRA.[16] This decision follows the recent trend of federal courts to give greater deference to state regulations which to some extent affect the operation of federal law.[17] It failed to clarify, however, the approach to be taken in a case in which it is alleged that a state law should be preempted because it frustrates the operation of federal labor law.

This Note will examine and criticize the Court's resolution of the preemption problem raised in *New York Telephone Co.* It will focus on the presumption of preemptive congressional intent invoked by the Court and the lack of suitable precedent for both the use of the presumption and the rationale which led to its use. The Note will then comment on the decision's probable impact on labor relations as well as its precedential effect on the doctrine of federal preemption.

FACTS AND PROCEDURAL HISTORY OF *NEW YORK TELEPHONE CO.*

The Communications Workers of America (CWA) represent about seventy percent of the non-management employees of the nationwide Bell Telephone Companies.[18] In 1971, most of these employees went on strike against the Bell Telephone Companies over a contract dispute.[19] After four days an agreement was reached between the Bell System Companies and the CWA.[20] As a result of this agreement, all Bell employees, excepting the

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Contrary to these holdings, the second circuit concluded in New York Tel. Co. v. New York State Dep't of Labor, 566 F.2d 388 (2d Cir. 1977), *aff'd*, 440 U.S. 519 (1979), that federal law does not preempt state statutes which provide for the payment of unemployment benefits to strikers.

12. 435 U.S. 941 (1978).

13. 566 F.2d 388 (2d Cir. 1977), *aff'd*, 440 U.S. 519 (1979).

14. Petitioner's Brief for Certiorari at 10.

15. *Id.* at 15.

16. 440 U.S. 519 (1979).

17. *See* note 148 *infra*.

18. 440 U.S. at 522.

19. *Id.* On April 30, 1971, CWA contracts with the two Bell System "pattern setting" companies expired. *See* note 22 *infra*. No agreement in regard to the terms of a new contract having been reached, the contracts with these two companies were extended on a day-by-day basis until July 14, 1971, as were CWA contracts with other Bell System Companies which expired between April 30 and July 14. New York Tel. Co. v. New York State Dep't of Labor, 434 F. Supp. 810, 812 (S.D.N.Y. 1977). On July 14, the CWA called a nationwide strike to compel the Bell System to reach a new agreement. *Id.* at 812-13.

20. 434 F. Supp. at 813.

petitioners' employees,[21] returned to work. This group continued to strike, intending to disassociate the New York units of the CWA from the nationwide contract, which was based on agreements reached by representative "pattern setting" companies.[22] The strike in New York was not settled for seven months, at which time the employees were given a contract that increased their wages above the level prescribed by the nationwide contract.[23] After the petitioners' employees had been on strike for eight weeks, they became eligible for unemployment compensation benefits under New York law.[24] By the end of the strike, New York Telephone Company's striking employees had received $49 million in unemployment compensation.[25] As a result of the strike, and under the complicated scheme by which unemployment compensation benefits are funded in New York,[26]

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21. 440 U.S. at 522. The petitioners included New York Telephone Co., Western Electric Co., American Telephone & Telegraph Co. Long Lines Department, and Empire City Subway Co. *Id.* at 522 n.1.

22. *Id.* Under the pattern bargaining format, the Bell System management and CWA officials would select two Bell affiliate companies and attempt to reach a contract settlement with each. These contracts would then be used as the basis for the contracts of all Bell System Companies. The New York CWA units, comprising about 38,000 members, *id.* at 522, attempted to break the pattern and obtain a more advantageous contract by refusing to ratify the pattern contract agreed upon by CWA officials and Bell affiliates. *Id.* at 522 n.1.

23. *Id.* at 522 & n.1.

24. N.Y. LABOR LAW § 592.1 (McKinney 1977). The strikers received an average of $75 per week tax free. 440 U.S. at 523. Some strikers received as much as $95 per week. 434 F. Supp. at 812.

25. 440 U.S. at 523. Because New York Telephone Co. employed by far the largest number of workers who were on strike against petitioners, *see* 434 F. Supp. at 813, figures reflecting its experience in funding the unemployment compensation payments are cited in the text accompanying notes 25-28 and in note 28 *infra*.

26. Under New York law, the state maintains an "unemployment insurance fund" which consists of all monies available to be paid as unemployment benefits. N.Y. LABOR LAW § 550 (McKinney 1977). The unemployment insurance fund is divided into two main accounts. The "general account" is made up of monies obtained from federal contributions, *see* 42 U.S.C. § 1103 (1976), occasionally employer contributions, and the earnings on the money in the fund. N.Y. LABOR LAW §§ 577.1(a), 577.2 (McKinney 1977). The money in the general account may be used in conjunction with separate federal contributions to administer the unemployment compensation program, to finance refunds, to pay benefits to certain employees who move into New York from out of state, and to pay claims against "employer accounts" which show negative balances. *Id.* §§ 577.1(b), 581.1(e). The "employer accounts" contain all of the contributions from individual employers. The amount and rate of contribution from any one employer is based on the employer's experience rating, i.e., the amount of unemployment benefits already paid to employees previously employed. *Id.* §§ 570.1, 581.

Employees are generally eligible for 156 "effective days" of benefits. *Id.* §§ 523, 590.4, 601. Not all of the unemployment compensation received by employees, however, is charged to the employer's account, thereby affecting the employer's experience rating. First, the employer's account is only charged with four days of benefits for every five during which the claimant was employed by that employer. After this computation uses up all the time claimant worked for the employer, the benefits are charged to the claimant's next previous employer, or to the general account, once former employers are used up. *Id.* § 581.1(e). Second, employers have limited liability for payment to employees who were employed at more than one job while working for the employer. *Id.* Third, any benefits paid by the federal government are not charged to

New York Telephone Company's unemployment compensation fund was depleted by about $40 million.[27] Within a span of four years New York Telephone Company was required to pay $27.3 million in unemployment compensation taxes to replace partially the amount of the fund expended as a result of the strike.[28]

Petitioners brought suit in federal district court against the New York State Department of Labor and the state officials responsible for the administration of the unemployment compensation fund.[29] Petitioners sought reimbursement of the increased unemployment compensation taxes paid as a consequence of the strike, an injunction against the enforcement of section 592.1 of the New York Labor Law,[30] and a declaration that the statute was preempted because it frustrated the operation of federal law.[31]

The district court, having examined the effect of unemployment compensation on strikes, determined that the availability of benefits to strikers is a substantial factor affecting an employee's willingness to strike initially or to

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employer accounts. *Id.* Fourth, only one-half of the last 52 effective days are charged to the employer's account. The other half is paid from the general account, and the general account is credited with amounts received from the federal government under 42 U.S.C. §§ 501-502, 1101-1105. N.Y. LABOR LAW § 601.4 (McKinney 1977). As can be seen, the struck employer does not pay all of the unemployment compensation benefits received by the strikers. Rather, the federal government and New York employers as a whole pay significant amounts.

27. 434 F. Supp. at 813.

28. Petitioner New York Telephone Co. funded about 56% of the unemployment compensation payments made to its striking employees. This percentage was obtained by the following calculation. In 1971, the year of the strike, New York Telephone Co. paid $3 million in unemployment compensation taxes. As a result of the strike and the depletion of the company's account, New York Telephone Co. paid $11.6 million in taxes in 1972, $12.7 million in 1973, $6 million in 1974, and $9 million in 1975. Assuming that if there had been no strike New York Telephone Co. would have paid about $3 million in each of these years, New York Telephone Co. paid $27.3 million in additional taxes as a result of the strike. This figure represents 56% of the $49 million in total benefits paid to New York Telephone Co. employees during the strike. *See* 434 F. Supp. at 813 n.4 (1974-75 figures); A. THIEBLOT & R. CORWIN, WELFARE AND STRIKES 176 (1972) [hereinafter as THIEBLOT & CORWIN] (1972-73 figures), *citing* N.Y. Times, Feb. 18, 1972, at 34, col. 2.

29. 434 F. Supp. at 810.

30. N.Y. LABOR LAW § 592.1 (McKinney 1977) reads as follows:

> The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, a lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning the day after such strike, lockout or other industrial controversy was terminated.

The seven week waiting period is in addition to an approximately one week waiting period required for all unemployment compensation claimants. *See* N.Y. LABOR LAW § 590.9 (McKinney 1977).

31. 440 U.S. at 525. The theory upon which the New York law was challenged was that federal labor law has balanced the economic bargaining powers of labor and management through protections and prohibitions of certain conduct by labor and management, and that the New York statute, by increasing the bargaining power of labor and by decreasing the bargaining power of management, had altered the balance struck by federal law. 434 F. Supp. at 812.

continue an ongoing strike.[32] After concluding that New York did not have a substantial interest in the payment of unemployment compensation to strikers, the court stated that the only issue was whether the New York statute conflicted with the policy of federal labor law.[33] The court reasoned that because the policy of federal labor law is to foster free collective bargaining between unions and management,[34] subject only to the balance of bargaining power struck by Congress in the NLRA and LMRA, the payment of unemployment benefits to strikers conflicts with federal law by upsetting the balance of power.[35] Because the law conflicted with federal law, the court held that the New York statute was preempted.

The Court of Appeals for the Second Circuit reversed.[36] The appellate court did not question the district court's finding that the New York statute altered the balance of power in the collective bargaining relationship and therefore conflicted with federal labor policy.[37] After examining the legislative history of the NLRA, Title IX of the Social Security Act,[38] and other materials, however, the court held that Congress had not expressed an intent to preempt state laws which provide unemployment compensation benefits for strikers.[39] The court therefore concluded that states are free to pay unemployment compensation to strikers, consequently upholding New York's law.[40] The United States Supreme Court affirmed.[41]

THE DOCTRINE OF LABOR LAW PREEMPTION

The doctrine of labor law preemption has been developed by a line of United States Supreme Court cases decided largely since 1945.[42] The doctrine concerns the extent to which Congress has allowed the states[43] and the federal judiciary[44] to regulate activity touching upon labor-management rela-

32. 434 F. Supp. at 814.

33. *Id.* at 819.

34. *Id.* at 820.

35. *Id.* at 824.

36. New York Tel. Co. v. New York State Dep't of Labor, 566 F.2d 388 (2d Cir. 1977).

37. *Id.* at 390.

38. Social Security Act, Pub. L. No. 74-271, §§ 901-910, 49 Stat. 639, 639-45 (1935) (current version at 26 U.S.C. §§ 3301-3311 (1976) and 42 U.S.C. §§ 501-504, 1101-1108 (1976)).

39. 566 F.2d at 395. This holding was made despite the court's recognition that generally state statutes which touch upon labor relations should be neutral. *Id.*

40. *Id.*

41. 440 U.S. at 546.

42. *See* cases cited in notes 43-45, 54, 58, 64, 66 & 67 *infra*. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW 766-86 (1976) [hereinafter cited as GORMAN]: Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 TEX. L. REV. 1037 (1973); Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1942) [hereinafter cited as Cox]; Lesnick *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469 (1972); Comment, *Federal Preemption in Labor Relations*, 63 NW. U.L. REV. 128 (1968) [hereinafter cited as *Federal Preemption*].

43. *See* Sears, Roebuck & Co. v. San Diego Co. Dist. Council of Carpenters, 436 U.S. 180, 187 (1978).

44. *See* Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 286 (1971).

tions. The purpose of federal preemption of state regulation is to avoid, to the largest extent practicable, the conflict inherent in regulation of labor relations by multiple tribunals.[45]

Federal regulation of the labor-management bargaining relationship is set forth in the NLRA and LMRA. The NLRA was designed to establish a balance of bargaining power between employers and employees[46] by giving employees enumerated rights to engage in certain collective bargaining activities[47] and by placing certain restrictions upon employers' and employees' freedom to engage in other collective bargaining activities.[48] The Supreme Court has held that a state may not exercise jurisdiction over claims brought under the NLRA.[49] Indeed, any claim of violation of the protections or prohibitions of the NLRA may be brought only before the National Labor Relations Board (NLRB), the tribunal established by Congress to adjudicate such claims.[50] Consequently, states are not empowered to regulate collective bargaining.

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45. *Id.*; Sears, Roebuck & Co. v. San Diego Co. Dist. Council of Carpenters, 436 U.S. 180, 187 (1978); Garner v. Teamsters Local 776, 346 U.S. 485, 490-91 (1953). *See also* GORMAN, *supra* note 42, at 767-68, 775-76.

46. Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 286 (1971). *See generally* NLRA § 1, 29 U.S.C. § 151 (1976); GORMAN, *supra* note 42, at 296; Cox, *supra* note 42, at 1339.

47. NLRA § 7, 29 U.S.C. § 157 (1976). Section 7 gives employees the rights, *inter alia*, to join unions, to bargain collectively, to engage in concerted activities for the purpose of collective bargaining, and to refrain from such activities except to the extent prohibited by an agreement requiring membership in a union as a condition of employment. *Id.*

48. *Id.* at § 8, 29 U.S.C. § 158 (1976). Some of the prohibitions upon employers are: interference with employees' exercise of section 7 rights, discrimination in regard to hire or tenure with the intent to encourage or discourage union membership, and refusal to bargain collectively with a union. Prohibitions upon labor organizations include, *inter alia*: interfering with employees' exercise of section 7 rights, refusing to bargain collectively with an employer, requiring employees to pay an excessive fee as a condition of becoming a union member, and engaging in certain types of strikes and coercive activities. *Id.*

49. Garner v. Teamsters Local 776, 346 U.S. 485 (1953); Hill v. Florida, 325 U.S. 538 (1945). The state would be barred from entertaining such claims by the operation of the supremacy clause. *See* note 10 *supra*. In general, the Supreme Court has found state regulatory power to be preempted in the following situations: (1) when Congress has exhibited an intent to completely occupy the field, *see, e.g.*, Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926); (2) when there is a direct conflict between state law and the express prohibitions of the federal law, *see, e.g.*, Hill v. Florida, 325 U.S. 538 (1945); and (3) when there is a conflict between the state regulation and the accomplishment of the full purposes of Congress. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941). *See also* Sinnot v. Davenport, 63 U.S. (22 How.) 227, 243 (1859) and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824), for early judicial statements of the preemption doctrine. *See generally* TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-22 to 6-27 (1978); Comment, *Federal Preemption: Governmental Interests and the Role of the Supreme Court*, 1966 DUKE L.J. 484 (1966) [hereinafter cited as *Governmental Interests*].

In the field of labor law preemption the Supreme Court has found that concurrent state and NLRB adjudication of claims of violation of the NLRA involved too large a potential for conflict of regulation and, consequently, too large a possibility of frustration of the purposes of federal law. *See* note 53 and text accompanying notes 53-55 *infra*.

50. NLRA §§ 3-6, 29 U.S.C. §§ 153-156 (1976).

In *San Diego Building Trades Council v. Garmon*,[51] the Supreme Court went a step further and held that a state is without such jurisdiction even if the right allegedly violated or the activity allegedly engaged in is only *arguably* within the purview of the NLRA.[52] The *Garmon* Court reasoned that because Congress entrusted the application of federal labor law to a special tribunal, Congress evidently intended that centralized administration was necessary both to obtain uniform enforcement of its legislation and to avoid the conflict[53] likely to result from local adjudication of labor controversies.[54] The Court concluded that the same potential for conflict of regulation exists when the threshold question for decision is whether or not the particular activity is governed by the NLRA, as when the activity is clearly regulated by the NLRA.[55]

It is not, however, only conduct arguably within the jurisdiction of the NLRB that a state is without power to regulate. By way of dictum in *Garner v. Teamsters Local 776*[56] and subsequently *Garmon*,[57] the Court suggested that even if an activity is neither arguably prohibited nor protected by the NLRA, state regulation of that activity may be preempted if the regulation would conflict with or frustrate federal labor law. Five years later, the *Garmon* and *Garner* dicta were sustained in *Local 20, Teamsters v. Morton*.[58] In *Morton*, an Ohio court awarded damages to a struck employer under state law because, during a strike, the union had persuaded management personnel of a customer of the struck employer to cease doing business with that employer. This conduct, which was illegal under Ohio law, was neither protected nor prohibited by the NLRA.[59] Nevertheless, the Supreme Court held that the use of this "weapon of self help"[60] could not be barred by the state, for prohibition of such conduct would operate to alter the economic

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51. 359 U.S. 236 (1959).

52. *Id.* at 245.

53. *Id.* at 242-43. Some of the diversities and conflicts thought likely to result from concurrent jurisdiction by the NLRB and the states over collective bargaining activities are: (1) duplication of effort if state and federal proceedings were to go on simultaneously; (2) risk of conflict in scheduling of proceedings and availability of evidence; (3) different findings of fact in close cases caused by chance, court "philosophy," or rules of procedure; and (4) difference in the timing and form of state and NLRB remedies. Cox, *supra* note 42, at 1342.

54. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242-43 (1959).

55. *Id.* at 244-45.

56. 346 U.S. 485, 500 (1953).

57. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959).

58. 377 U.S. 252 (1964).

59. *Id.* at 258. Similar conduct, however, has been prohibited. Under the NLRA it is illegal to encourage non-management employees of a customer of the struck employer to exert pressure on their employer with the object of forcing him to cease doing business with the struck employer. NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976).

60. "Weapons of self help" are those tactics which the NLRA allows employees and employers to use to support their collective bargaining positions. *See* Local 20, Teamsters v. Morton, 377 U.S. 252, 259 (1964). *See also* note 128 and accompanying text *infra*.

balance of bargaining power struck by Congress and thus frustrate the purpose of the federal legislation.[61] Therefore, the Ohio law was held to be preempted.[62]

Despite these restrictions upon state regulation of labor relations, the Supreme Court has made clear that not every state law which may potentially infringe upon the policy objective of federal labor law is preempted.[63] If the activity regulated by the state is only a peripheral concern of the NLRA or LMRA,[64] or if the state's interest in controlling the activity is "deeply rooted in local feeling and responsibility,"[65] the Court has hesitated to infer that Congress intended the states to be without regulatory power.[66] The Court has stated that "[t]he purpose of Congress is the ultimate touchstone"[67] in determining whether state law is preempted. It might be the case, as the Second Circuit suggested in *New York Telephone Co.*, that "the conflict is one which Congress has decided to tolerate."[68]

THE *NEW YORK TELEPHONE CO.* DECISION

In *New York Telephone Co.* the Supreme Court held that New York's law authorizing the payment of unemployment compensation to strikers was not preempted by federal labor law.[69] The majority initially recognized that the payment or receipt of unemployment compensation benefits is neither prohibited nor protected by the NLRA.[70] The Court stated that the main body of labor law preemption cases, therefore, had little precedential value over the case at bar because these cases dealt with conduct at least arguably within the purview of the NLRA.[71] The Court consequently turned its at-

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61. Local 20, Teamsters v. Morton, 377 U.S. 252, 259-60 (1964).

62. *Id.* at 260.

63. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959).

64. *Id.* at 243; International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958).

65. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

66. *See, e.g.*, UAW v. Russell, 356 U.S. 634 (1958) (states can award tort damages for injuries sustained through unfair labor practice); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (states can enjoin violent and obstructive activities); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) (states can award common law tort damages).

67. Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963). *See also* Malone v. White Motor Corp., 435 U.S. 497, 504 (1978); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

68. New York Tel. Co. v. New York State Dep't of Labor, 566 F.2d 388, 395 (2d Cir. 1977). The Supreme Court also has stated that in a preemption case it could be found that Congress intended to tolerate a degree of state interference with federal law. "Congress under the Commerce Clause may displace state power . . . or it may even by silence indicate a purpose to let state regulation be imposed on the federal regime." Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96, 103-04 (1963).

69. 440 U.S. at 546.

70. *Id.* at 529.

71. *Id.* at 529-30.

tention to two cases in which state regulation of conduct neither arguably prohibited nor protected by the NLRA was held to be preempted.[72]

In *Local 20, Teamsters v. Morton*,[73] discussed previously, the Supreme Court stated that the question whether local law must give way to the principles of federal labor law ultimately depends upon whether the state law would operate to frustrate the purpose of the federal legislation.[74] The *Morton* Court also determined that the conduct[75] sought to be prohibited by the state was specifically considered by Congress because Congress prohibited closely related behavior.[76] *Morton* held that because the conduct was addressed by Congress but not prohibited and because prohibition of the behavior by the state operated to frustrate federal law, it could be inferred that Congress intended that the conduct be free of all regulation.[77] The *New York Telephone Co.* majority found the dispositive fact in *Morton* to be that the conduct was focused upon but not prohibited.[78] Since Congress did not address the behavior in question in *New York Telephone Co.*, the Court implied that preemptive intent should not be so easily inferred.[79]

The Court also distinguished *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*[80] from the case at bar.[81] In *Lodge 76* the Court held that Wisconsin was without authority to prohibit employees from refusing to work overtime during contract negotiations in order to compel the employer to submit to their de-

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72. *Id.* at 530. The two cases considered and distinguished by the Court were Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) and Local 20, Teamsters v. Morton, 377 U.S. 252 (1964). Although the Court is correct in stating that these are the only two cases in which it has held state regulation of conduct neither prohibited nor protected by the NLRA to be preempted, the Supreme Court has decided closely analogous cases. For example, in NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960), the Court held that certain concerted on-the-job activities designed to interfere with the employer's business, but not prohibited by the NLRA, also could not be prohibited by the NLRB. It was judged that prohibition of these activities would intrude on an area deliberately left unregulated by Congress and was therefore preempted by federal labor policy. *Id.* at 499-500. Similarly, in American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965), the Court held that the NLRB could not forbid an employer to use the lockout as an economic weapon, even though the lockout was not protected by the NLRA, since it could be implied that Congress intended that the lockout not be prohibited. *Id.* at 314-15. As the dissent in *New York Tel. Co.* pointed out, the Court has made clear that "[t]he States have no more authority than the Board to upset the balance that Congress has struck between labor and management in the collective bargaining relationship." 440 U.S. at 554 (Powell, J., dissenting). *See also* Garner v. Teamsters Local 776, 346 U.S. 485, 500 (1953).

73. 377 U.S. 252 (1964).

74. *Id.* at 258.

75. *See* notes 58-61 and accompanying text *supra*.

76. Local 20, Teamsters v. Morton, 377 U.S. 252, 259-60 (1964).

77. *Id.*

78. 440 U.S. at 530.

79. *Id.* at 530-33.

80. 427 U.S. 132 (1976).

81. 440 U.S. at 531-32.

mands.[82] Because the majority in *Lodge 76* considered this employee conduct to be "part and parcel of the process of collective bargaining,"[83] it concluded that Congress intended that such conduct be left unregulated.[84] The situation in *New York Telephone Co.* was distinguishable, the Court held, because it did not involve an attempt by the state to regulate or prohibit private conduct instrumental to collective bargaining.[85] Instead, the majority indicated that the New York statute had the broad purpose of insuring employment security in the state by distributing benefits to unemployed workers in general and was therefore a statute of general applicability.[86] The Court concluded that when a statute has a general purpose, it is more difficult to infer congressional intent to preempt.[87]

Other factors weighing against an inference of congressional preemptive intent included New York's interest in paying unemployment compensation to strikers[88] and the fact that Congress was sensitive to the states' interest in fashioning their own unemployment compensation statutes.[89] The Court

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82. Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 154-55 (1976).

83. *Id.* at 149, *quoting* NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 495 (1960).

84. Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 149 (1976).

85. 440 U.S. at 532.

86. *Id.* at 532-33.

87. *Id.* at 533, *citing* Sears, Roebuck & Co. v. San Diego Co. Dist. Council of Carpenters, 436 U.S. 180 (1978) *and* Farmer v. United Bhd. of Carpenters Local 25, 430 U.S. 290 (1977).

88. *Id.* at 534. The Court at this point made an analogy, by implication, between the case at bar and cases where it has been alleged that the payment of public welfare benefits to strikers is preempted by federal law. 440 U.S. at 534 & n.23. In these "public welfare" cases the courts have been unwilling to infer congressional preemptive intent and, consequently, to hold the payment of welfare benefits preempted, largely because of the recognition that states have substantial interests in making welfare payments to their citizens. *See, e.g.*, Super Tire Eng'r Co. v. McCorkle, 550 F.2d 903 (3d Cir. 1977), *cert. denied*, 434 U.S. 827 (1978); ITT Lamp Div. of Int'l Tel. & Tel. Corp. v. Minter, 435 F.2d 989 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971). The *New York Tel. Co.* Court believed that New York had a similar interest in paying unemployment compensation to strikers and, therefore, implied that *New York Tel. Co.* should be decided in the same way as the "public welfare" cases. 440 U.S. at 534 & n.23. A moment's reflection, however, leads one to realize the faultiness of such an analogy. First, as the Court recognized, public welfare benefits are not financed by the struck employer, as are unemployment compensation benefits. *Id.* at 534. Therefore, the economic impact of welfare payments upon the outcome of a strike should be about one-half of the impact of the payment of unemployment benefits, assuming equal payments. *See* Super Tire Eng'r Co. v. McCorkle, 550 F.2d at 908. Second, the state interest in paying unemployment compensation to strikers is arguably less strong than the interest in paying welfare to strikers because the payment of welfare is based on need, while unemployment benefits are based on joblessness that is not necessarily related to need. *See* discussion of ITT Lamp Div. of Int'l Tel. & Tel. Corp. v. Minter, 435 F.2d 989 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971), and Grinnell Corp. v. Hackett, 475 F.2d 449 (1st Cir.), *cert. denied*, 414 U.S. 858 (1973), in note 140 *infra*. *See also* Comment, *Welfare Assistance to Strikers in Need: The Protestant Ethic Revisited*, 67 NW. U.L. REV. 245, 249-50, 252-53 (1972).

89. 440 U.S. at 539.

stated that New York's law implemented a broad state policy reflecting that state's conclusion "that the community interest in the economic security of persons directly affected by a strike outweighs the interest in avoiding any impact upon the collective bargaining process in a particular labor dispute."[90] The Court further stated that the legislative history of the Social Security Act[91] made clear that the states were to have broad freedom in setting up their unemployment compensation programs.[92] For these reasons, the Court held that it was "appropriate to treat New York's statute with the same deference that [it had] afforded analogous state laws of general applicability that protect interests deeply rooted in local feeling and responsibility."[93]

The *New York Telephone Co.* majority was further reluctant to infer preemptive congressional intent because of the Court's view of the impact of unemployment compensation payments upon a struck employer. Although the Court accepted the district court's finding that New York's law altered the economic balance of power between labor and management, the Court maintained that the payment of unemployment compensation does not have as substantial an impact on labor disputes as does direct state regulation of labor-management relations.[94] Because unemployment compensation benefits are not a form of direct compensation to strikers, but rather a disbursal of public funds obtained partially from the federal government and, in New York, partially from state employers as a group, the Court concluded that the impact on the struck employer was to an extent mitigated.[95]

Since New York's law was of general applicability, was analogous to laws considered "deeply rooted in local feeling and responsibility," and had only

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90. *Id.* at 534.

91. The Social Security Act established a federal unemployment compensation program whereby an excise tax is imposed upon all employers in the United States which may be mitigated by a credit allowed to all employers who contribute to approved state unemployment compensation programs. 26 U.S.C. §§ 3301-3304 (1976). If a state unemployment compensation plan meets further requirements, the state becomes eligible for federal funds to be used in the administration of the state program, 42 U.S.C. §§ 501-503, 1101 (1976), and in the funding of certain benefits. 42 U.S.C. §§ 1103-1105 (1976). Some of the requirements which state plans must meet concern eligibility for the receipt of benefits, *see* 26 U.S.C. § 3304(a)(5) (1976), but no provision concerns the eligibility of strikers.

92. 440 U.S. at 537. The Court relied heavily on Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471 (1977), in support of its conclusion that states were to have great latitude in setting up their unemployment compensation programs. In *Hodory* an employee who had been involuntarily deprived of his job as a result of a labor dispute in which he was not involved alleged that he had a right, under Title IX of the Social Security Act, to collect unemployment compensation benefits. The Court held that Ohio had sufficient freedom when designing its unemployment compensation program to exclude the employee from eligibility for benefits. *See also* Batterton v. Francis, 432 U.S. 416 (1977).

93. 440 U.S. at 539-40.

94. *Id.* at 534-35.

95. *Id.*

an indirect impact on labor disputes, the Court held that it could not infer congressional intent to preempt in the absence of *compelling evidence* of such intent.[96] Consequently, the Court then looked to the legislative history for compelling evidence that Congress intended to preempt any state law which authorized the payment of unemployment compensation to strikers.[97] The majority found no such compelling evidence in the history of the NLRA.[98] Instead, by examining various indicia of congressional intent found in the legislative history of the Social Security Act,[99] the Court de-

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96. *Id.* at 540.

97. *Id.* at 540-45.

98. *Id.* at 540.

99. The Court cited the following materials in support of its proposition that Congress intended that the states be free to pay unemployment compensation to strikers if they wished:

(1) S. REP. NO. 628, 74th Cong., 1st Sess. 13 (1935) [hereinafter cited as S. REP. NO. 628. The Court stated that this report referred to the New York statute as qualifying under the Social Security Act guidelines and contained statements to the effect that the states are to have great latitude in setting up their unemployment compensation programs. 440 U.S. at 541 & n.37. In fact, the report did not state that New York's statute qualifies generally under the Social Security Act, but only implied that the statute qualifies in respect to the method of funding unemployment benefits.

(2) 26 U.S.C. § 3304(a)(5) (1976) which provides, *inter alia*, that a state may not deny unemployment compensation to an applicant for refusal to accept work as a strikebreaker or refusal to resign from a union as a condition of employment. This statute was cited as evidence that the states were free to set up whatever kind of programs they wished, subject to only a few express prohibitions. 440 U.S. at 542 & n.40.

(3) *Hearings on S. 1130 before the Senate Committee on Finance*, 74th Cong., 1st Sess. 3 (1935) (statement of Robert Wagner) [hereinafter cited as *Hearings on S. 1130*] in which a principle sponsor of both the NLRA and the Social Security Act advocated local freedom of choice with respect to unemployment programs. 440 U.S. at 541 n.36.

(4) *Hearings on S. 1130* at 1326 in which it was stated "[t]he plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish. We believe that all matters in which uniformity is not absolutely essential should be left to the states." 440 U.S. at 537 n.28.

(5) *Hearings on S. 1130* at 228, 472 (written submissions of Edmund Witte and Abraham Epstein) in which it was recommended that benefits be withheld from strikers. These recommendations were not adopted, and this congressional failure to act was cited as indicative of congressional intent to allow states to pay unemployment compensation to strikers. 440 U.S. at 542-43 & n.41.

(6) Act of August 28, 1935, ch. 794, § 10(a), 49 Stat. 950 (1935) (D.C. CODE ENCYCL. § 46-310(f) (West 1968)) which provided that strikers not receive benefits under the District of Columbia's program. This was cited as evidence of Congress' commitment to free local choice and as an indication that Congress did not assume nor intend that the passage of the NLRA would preempt the payment of unemployment compensation to strikers. 440 U.S. at 543 n.41.

(7) H.R. REP. NO. 510, 80th Cong., 1st Sess. 32-33 (1947) [hereinafter cited as H.R. REP. NO. 510]. The House version of the LMRA, H.R. 3020 § 2(B), 80th Cong., 1st Sess. (1947), included a provision effectively denying the protections of the NLRA to a striker who received unemployment benefits from a state by not classifying such a striker as an employee for the purposes of the NLRA. This provision was deleted without comment by the conference committee report, H.R. REP. NO. 510, and consequently from the version of the bill finally enacted. 440 U.S. at 544 n.44.

termined that Congress intended that the states should individually make the decision whether to pay unemployment compensation to strikers.[100] Thus New York's law was held not to be preempted.

CRITICISM OF THE COURT'S OPINION

The *New York Telephone Co.* decision is subject to question on the grounds of misinterpretation of congressional intent and misapplication of precedent. The finding that Congress intended that the states be free to pay unemployment compensation to strikers is suspect when the legislative materials examined by the Court and other relevant materials are analysed. The presumption of non-preemptive congressional intent, resulting from the Court's holding that compelling evidence of congressional intent was necessary to deem New York's law preempted, is questionable because of apparent conflict with Supreme Court precedent. Similarly, the rationale which led the Court to require compelling evidence of Congress' intent is unconvincing, again, because of failure to follow precedent.

The Court's Analysis of Legislative History

It is clear that in determining whether state regulation is preempted by federal law, the intent of Congress is controlling.[101] If it is true that an examination of the legislative history of the Social Security Act discloses that Congress intended that the states be free to pay unemployment compensation to strikers, the Court's holding that New York's law is not preempted is undoubtedly correct. The legislative materials, however, do not give rise to this inference, and, in fact, the congressional intent manifested in these documents is at best ambiguous.[102]

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(8) 115 CONG. REC. 34106 (1969) (remarks of Rep. Mills) in which Mr. Mills pressed his belief that the states have the freedom to pay unemployment compensation to strikers if they so wish. The *New York Tel. Co.* Court cited Mills' statement as having been made in opposition to an amendment proposed by the President which would have expressly excluded strikers from receiving benefits. 440 U.S. at 544 n.44. In fact, the statement was not made in opposition to the amendment, but was in response to a question put to him by representative Kyl as to whether a person receiving disability benefits and a pension could receive unemployment compensation if the state wanted to give it to him. 115 CONG. REC. 34106 (1969) (remarks of Rep. Mills).

(9) 45 U.S.C. § 354(a-2)(iii) (1976) (Railway Unemployment Insurance Act) and 7 U.S.C. § 2014(c) (1976) (Food Stamp Act). Under these programs strikers are eligible for benefits. This was cited as evidence that allowing strikers to receive certain benefits does not force the Federal Government "to take sides in labor disputes." H.R. REP. NO. 1402, 91st Cong., 2d Sess. 11 (1970). 440 U.S. at 544 n.44.

100. 440 U.S. at 540.

101. *See* cases cited in note 67 *supra*. *See also* Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443 (1960); Southern Pacific Co. v. Arizona, 325 U.S. 761, 766 (1945).

102. *See* notes 104-110 *infra*. Three federal courts have agreed that evidence of congressional intent in regard to preemption of state unemployment compensation laws is inconclusive. *See* Grinnell Corp. v. Hackett, 475 F.2d 449, 457-58 (1st cir.), *cert. denied*, 414 U.S. 858 (1973); Hawaiian Tel. Co. v. Hawaii Dep't of Labor and Indus. Relations, 405 F. Supp. 275,

With one exception, the Court was unable to cite any document expressly stating that Congress intended to allow the states freedom to authorize the payment of unemployment compensation benefits to strikers. The exception, remarks of a Congressman made in 1969,[103] are of little probative value not only because the comment was made thirty-four years after the enactment of the Social Security Act, but also because certain rules of statutory construction dictate that such remarks be given little weight.[104] In addition, the Congressman made contradictory remarks in the same congressional debate.[105] Much of the other extrinsic evidence relied upon by the majority in *New York Telephone Co.* failed to support the Court's interpretation of congressional intent because of contrary, but equally valid, inferences which might be drawn from the evidence.[106] Still other evidence cited by the Court

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286-87 (D. Hawaii 1976), *cert. denied*, 435 U.S. 943 (1978); Dow Chemical Co. v. Taylor, 57 F.R.D. 105, 108 (E.D. Mich. 1972).

103. 115 CONG. REC. 34106 (1969) (remarks of Rep. Mills).

104. The Supreme Court has made clear that statements of individual legislators concerning the interpretation of a statute are generally held inadmissible as aids in construing legislation. *See, e.g.*, U.S. v. UMW, 330 U.S. 258 (1947); Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845). The Court has stated:

> [I]t is impossible to determine with certainty what construction was put upon an act by the members of the legislative body that passed it by resorting to the speeches of the individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other. . . .

U.S. v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 (1897).

It is also a rule that the opinion of a member of a subsequent legislature in regard to the meaning of a statute passed by a previous legislature is not entitled to much weight. U.S. v. Philadelphia Nat'l Bank, 374 U.S. 321, 348-49 (1963).

105. Representative Mills stated, "I hope we will bear in mind that the real objective of the unemployment compensation is to take up the slack created when a person has lost his job *involuntarily*." 115 CONG. REC. 34105 (1969) (remarks of Rep. Mills) (emphasis added).

106. The Court reaffirmed its conclusion in Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471 (1977), that the fact that Congress did not prohibit the states from conditioning benefits upon the acceptance of work as a strikebreaker or the acceptance of work which would require joining a company union, 26 U.S.C. § 3304(a)(5) (1976), is evidence that Congress did not intend to prohibit strikers from receiving benefits. 440 U.S. at 538 & n.29, *citing* Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. at 488-89. As the dissent in *New York Tel. Co.* pointed out, the prohibition against the states' imposing certain conditions upon the receipt of benefits can just as reasonably be interpreted as indicating an intention to prohibit interference with the collective bargaining balance struck in the NLRA. 440 U.S. at 564-65 (Powell, J., dissenting). Moreover, the Supreme Court by its decision in Nash v. Florida Indus. Comm'n, 389 U.S. 235 (1967), made clear that states are without power, in some cases, to condition benefits upon certain criteria even where there is no contention that the states are prohibited from doing so by the Social Security Act. In *Nash* the Court held that the NLRA preempted a state policy of denying unemployment compensation benefits to employees who had filed unfair labor practice charges against their employers because this state action frustrated the purposes of the federal labor law. 389 U.S. at 240. Clearly, the Court's statement that non-prohibition of a state regulation means that Congress intended that the states be free to so regulate runs contrary to previous labor law decisions in which the Court has held preempted state or NLRB action which was neither prohibited nor protected by express provision of the NLRA. *See* United States Supreme Court cases cited in note 134 *infra*.

admittedly supported its view that Congress intended to pay unemployment compensation to strikers, but did so by implication at best.[107] Many of the inferences were drawn from congressional silence and inaction[108] as well as

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The Court also relied on the fact that Congress enacted an unemployment compensation law for the District of Columbia, D.C. CODE ENCYCL. § 46-310(f) (West 1968), which prohibited strikers from receiving benefits. 440 U.S. at 543 n.41. This was cited as implying that Congress intended that there should be local freedom of choice regarding the eligibility of strikers for benefits. It could just as well be interpreted, however, as implying that Congress specifically designed this bill to be free of any possible conflict with the NLRA and, consequently, safe for the states to follow. According to the bill's sponsor, the District of Columbia statute was to "serve as a beacon light which the states of the union could safely follow." 79 CONG. REC. 8274 (1935) (remarks of Rep. Ellen Bogen). *See also* H.R. REP. NO. 858, 74th Cong., 1st Sess. 8 (1935). It is further significant that the "draft bills"prepared by the Social Security Board which were meant to be used as examples by the states provided that strikers were not eligible for unemployment compensation benefits. DRAFT BILLS, *supra* note 3.

The Court further relied on the fact that the Food Stamp Act, 7 U.S.C. § 2014(c) (1976), and the Railway Unemployment Insurance Act, 45 U.S.C. § 354(a-2)(iii) (1976), allow strikers to receive benefits. 440 U.S. at 544 n.44. It was inferred that Congress judged that the provision of welfare benefits to strikers does not conflict with the collective bargaining balance of power. *Id.* at 544-45.

It is true that the provision of benefits to strikers under the Food Stamp Act does not frustrate the operation of federal law. Unlike unemployment compensation, food stamp benefits are conditioned upon the claimant's income and assets becoming insufficient to supply the necessities of life. 7 U.S.C. § 2014(a) (1976). Receiving food stamps, therefore, does not appear to be the type of benefit which would encourage a striker, to any great extent, to hold out longer. The potential for upsetting the balance of bargaining power is small. The food stamp program also differs from unemployment compensation in that the benefits are funded out of general tax revenues, 7 U.S.C. § 2025(a) (1976), not directly by a participant in a labor dispute. As a result there is even less possibility of such payments having a significant effect on the balance of bargaining power.

The Railroad Unemployment Insurance Act (RUIA) does allow strikers to receive unemployment benefits which would be expected to have an impact upon the collective bargaining relationship. The RUIA, however, is a wholly separate program than the labor-management system set up in the NLRA, and it has established an entirely different balance of power. Eligibility for unemployment benefits was given to railroad workers as a special incentive: "Congress deemed continuous, uninterrupted operation of railroads so vital to the public interest that it afforded to railroad workers this special dispensation conditioned upon their compliance with procedural safeguards plainly designed to defer strikes to the last possible moment." Brotherhood of Rwy. & S.S. Clerks v. Railroad Retirement Bd., 239 F.2d 37, 42-43 (D.C. Cir. 1956). This statute is therefore irrelevant in elucidating the intent of Congress regarding the payment of unemployment compensation to strikers in any context other than that of the RUIA.

In fact, the authorization of the payment of welfare benefits to strikers in the Food Stamp Act and the RUIA may support the inference that Congress, when it intended to risk some alteration of the collective bargaining balance which it created, was able to do so by express provision. It can therefore be inferred that if Congress intended to allow unemployment compensation benefits for strikers to alter the balance set up in the NLRA, it would have authorized such payments expressly in the Social Security Act.

107. *See* notes 108 & 109 *infra*.

108. The Court found material the fact that written submissions to a Senate committee hearing recommended that the states not be allowed to pay unemployment compensation to strikers, and such a provision was not included in the Social Security Act. 440 U.S. at 542-43, *citing Hearings on S. 1130, supra* note 99, at 228, 472. The Court relied on the fact that amendments to the Social Security Act that would have effectively disqualified strikers from receiving un-

isolated statements of general congressional intent,[109] neither of which are strong bases for inference. Since there exists other evidence, not cited by the Court, from which it can be inferred that Congress intended that strikers *not* be eligible for benefits,[110] it becomes clear that no definite conclusion in regard to Congress' intent can be drawn from the legislative materials.

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employment compensation benefits were suggested twice, and these amendments were not adopted. *Id.* at 544 & n.44. *See* 115 CONG. REC. 18538 (1969); H.R. 3020 § 2(B), 80th Cong., 1st Sess. (1947).

This evidence is entitled to little weight. As the Supreme Court has made clear, "non-action by Congress affords the most dubious foundation for drawing positive inferences." U.S. v. Price, 361 U.S. 304, 310-11 (1960). A leading authority on statutory construction has stated that legislative silence is a " 'poor beacon' to follow in construing a statute." 2A SUTHERLAND, STATUTORY CONSTRUCTION § 49.10 (4th ed. 1973) [hereinafter cited as SUTHERLAND].

Non-adoption of amendments or recommendations by a congressional committee is a form of non-action. Although it is generally true that the rejection of an amendment *by the legislature* indicates that the legislature did not intend the bill to include the provisions embodied in the rejected amendment, Lapina v. Williams, 232 U.S. 78, 89 (1914), it is not clear that non-adoption by a legislative committee should be given the same weight. As the dissent pointed out, the question of whether unemployment compensation should be paid to strikers was never debated on the floor during consideration of the Social Security Act and received no attention in the committee reports. 440 U.S. at 561-63 (Powell, J., dissenting). The dissent further noted that no explanation was given for the non-adoption of the proposed amendments. *Id.* at 563 n.18. The First Circuit correctly assessed the significance of the conference committee's silent deletion of the proposed 1947 amendment, which would have excepted strikers who received unemployment compensation from the protections of the NLRA, when it stated: "Given this silence, the enormous political controversy surrounding the Taft-Hartley Act, and the consequent need for compromises, perhaps unreasoned or hasty, we cannot read this deletion and the subsequent approval of the conference bill as specific resolution of the problem." Grinnell Corp. v. Hackett, 475 F.2d 449, 455 (1st Cir. 1973).

109. The Court relied on general statements from the legislative history of the Social Security Act to the effect that the states were to have great latitude in setting up their unemployment compensation programs. 440 U.S. at 537, 543, *citing* S. REP. NO. 628, *supra* note 99, at 13; *Hearings on S. 1130*, *supra* note 99, at 3, 1326. The Court inferred from these statements that this latitude extended to the payment of unemployment benefits to strikers. This inference is not a necessary one. A closer examination of the committee report reveals that the committee desired that the "Federal Government should not attempt to dictate to the States which *type* of unemployment compensation law they should adopt." S. REP. NO. 628, *supra* note 99, at 14 (emphasis added). The word *type*, it is apparent from the report, refers to the authorized method of funding unemployment compensation payments, of managing funds, and of distributing benefits. The committee, it is clear, was not referring to eligibility standards when it described the wide latitude the states were to have. *Id.*

The Court also relied on the fact the S. REP. NO. 628, *supra* note 99, at 13, implied that New York's law qualified under the Social Security Act guidelines. 440 U.S. at 541. Under the express guidelines of the Act as adopted, 26 U.S.C. § 3304 (1976) and 42 U.S.C. § 503 (1976), of course, it does qualify. The report, however, does not contain any reference to the striker benefit provision of New York's law, nor to the problem of the eligibility of strikers in general. Therefore, it can hardly be said that the committee's implication that New York's law was acceptable under the Social Security Act can be read as an endorsement of the payment of benefits to strikers.

110. For example, the Court failed to take notice of the fact that the legislative history of the Social Security Act and its proposed amendments contain statements to the effect that unemployment compensation was intended to be paid only to those involuntarily unemployed. *See*

The Court's Presumption of Non-Preemptive Intent

Even if the *New York Telephone Co.* Court came to the conclusion that Congress' intent as expressed in the legislative history was ambiguous, the majority still would have held that Congress did not intend to preempt the New York statute. This is true because the Court required a showing of compelling evidence of congressional intent before it would deem New York's law preempted.[111] In effect, the Court adopted a presumption of

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UNITED STATES COMMITTEE ON ECONOMIC SECURITY, REPORT TO THE PRESIDENT 21 (1935); S. REP. NO. 628, *supra* note 99, at 11; 115 CONG. REC. 34105 (1969) (remarks of Rep. Mills). Nor did the Court consider the President's interpretation of the Social Security Act in regard to the payment of unemployment compensation to strikers: "The unemployment tax we require employers to pay was never intended to supplement strike funds to be used against them. A worker who chooses to exercise his right to strike is not involuntarily unemployed." 115 CONG. REC. 18538 (1969).

Additional evidence that Congress did not intend that strikers receive benefits can be inferred from the expressed general purpose of the Social Security Act. One commentator, having made a survey of the unemployment compensation committee reports (H.R. DOC. NO. 81, 74th Cong., 1st Sess. vii, 8, 10 (1935); H.R. REP. NO. 615, 74th Cong., 1st Sess. 3, 7, 8-9 (1935); S. REP. NO. 628, *supra* note 99, at 10, 11, 15), concluded "that the overriding purpose of Congress was to provide a means for combating the severe hardships and distress of unemployment resulting from cyclical depression." Haggart, *supra* note 1, at 673. A quote from S. REP. NO. 628 is instructive:

> From 1920 to 1936 there were at all times an average of at least 1,500,000 industrial workers in this country who were *involuntarily unemployed.*
>
> . . . .
>
> . . . The essential idea in unemployment compensation is the creation of reserves during periods of employment from which compensation is paid to *workmen who lose their positions when employment slackens* and who cannot find other work. Unemployment compensation differs from relief in that payments are made as a matter of right, not on a need basis, but only while the worker is *involuntarily unemployed.* . . . Payment of compensation is conditioned upon continued *involuntary unemployment.*

Id. at 10-11 (emphasis added). Thus, in keeping with the policy of the Social Security Act, it may be inferred that Congress did not intend that anyone voluntarily unemployed, including strikers, receive benefits.

The majority opinion made a telling observation when it suggested that "this case may be viewed as presenting a potential conflict between two federal statutes—Title IX of the Social Security Act and the NLRA—rather than between federal and state regulatory statutes." 440 U.S. at 539 n.32. It suggested by this statement that if Title IX had never been enacted and New York's own, not federally sanctioned, unemployment compensation statute had provided benefits for strikers, there would have been little difficulty finding that Congress intended by the NLRA to preempt such a statute. Because, however, Title IX was enacted after the NLRA and New York's statute conforms to the requirements of Title IX, the question arises whether Congress intended when passing Title IX to allow the states to pay unemployment compensation to strikers and thus amend the NLRA. If this is the true conflict involved in this case, the dissent is correct when it points out that even if it can be implied from extrinsic evidence that Congress intended the states to be free to give benefits to strikers when it passed Title IX, since implied repeal or amendment of a statute is not favored, the NLRA should not be held to be amended. 440 U.S. at 566 & n.22. (Powell, J., dissenting). The Supreme Court has made clear its disfavor of implied amendment. *See* U.S. v. Welden, 377 U.S. 95, 102 n.12 (1964); U.S. v. Borden Co., 308 U.S. 188, 198 (1939); Frost v. Wenie, 157 U.S. 46, 58 (1895).

111. 440 U.S. at 540.

non-preemptive congressional intent. The adoption of this presumption appears to be erroneous.

In general, two factors have been of consequence to the Court in ascertaining congressional intent regarding preemption when all extrinsic and intrinsic sources of evidence of intent have been exhausted.[112] Many of the decisions indicate that whether preemptive intent is to be inferred[113] is simply a matter of determining whether the state law conflicts with federal legislation or will frustrate the operation of federal law.[114] Other decisions,

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112. The Court has been faced with such a problem in numerous cases. *See, e.g.*, cases cited in notes 114 & 138 *infra*. In San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), the Court commented generally on the task with which it was faced in deciding whether Congress intended that a state have the authority to award damages to an employer resulting from a union's peaceful picketing:

> [T]hese problems came to us as ordinary questions of statutory construction. But they involved a more complicated and perceptive process than is conveyed by the delusive phrase "ascertaining the intent of the legislature." Many of these problems probably could not have been, at all events were not, foreseen by Congress. Others were only dimly perceived and their precise scope only vaguely defined. This Court was called upon to apply a new and complicated legislative scheme, the aims and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process. Recently we indicated the task that was cast upon this Court in carrying out with fidelity the purposes of Congress, but doing so by giving application to congressional incompletion.

Id. at 239-40.

113. The Supreme Court in Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), made clear that it is proper to infer congressional preemptive intent from the fact of conflict with or frustration of federal law:

> Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . *Such a purpose may be evidenced in several ways.* The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assured to preclude enforcement of state laws on the same subject. . . . *Or the state policy may produce a result inconsistent with the objective of the federal statute.*

Id. at 230 (emphasis added) (citations omitted).

114. Labor law cases which have inferred preemptive intent from the fact of conflict with or frustration of federal policy are: Malone v. White Motor Corp., 435 U.S. 497, 504 (1978); Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 148 (1976); Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969); Nash v. Florida Indus. Comm'n, 389 U.S. 235, 240 (1967); Local 20, Teamsters v. Morton, 377 U.S. 252, 258 (1964); Local 24, Teamsters v. Oliver, 358 U.S. 283, 296 (1959); Hill v. Florida, 325 U.S. 538, 542 (1945).

Cases, other than in the labor law context, supporting the proposition that preemption is presumed if state law conflicts with or frustrates federal policy are: Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) (Federal Agricultural Marketing Agreement Act); Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, 722 (1963) (Federal Aviation Act and Railway Labor Act); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (United States Warehouse Act); Jerome v. U.S., 318 U.S. 101, 104 (1943) (Bank

however, make clear that a second factor, the state's interest in regulating the conduct which touches upon federal law, must be considered in attempting to elucidate congressional intent in regard to preemption.[115]

In the labor law preemption cases, the Court has found that when the state's interest in regulation is "deeply rooted in local feeling and responsibility,"[116] it will not infer congressional intent that the state law be preempted and that the states be deprived of the authority to regulate.[117] In non-labor law preemption cases, although the Court has not categorized state interests as "deeply rooted," it has regarded certain state concerns as highly important. Due to the state's special interest, congressional intent to preempt the state regulation which protects these interests[118] is considered unlikely.

Robbery Act); Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (Federal Alien Registration Act of 1940); Savage v. Jones, 225 U.S. 501, 533 (1912) (Federal Food and Drug Act); Sinnot v. Davenport, 63 U.S. (22 How.) 227, 243 (1859) (federal laws licensing ships engaged in interstate commerce).

Justices Blackmun and Marshall, concurring in *New York Tel. Co.*, 440 U.S. at 549 (Blackmun, J., concurring), and the Chief Justice, Justice Powell and Justice Stewart, dissenting, 440 U.S. at 554 (Powell, J., dissenting), agreed that preemptive intent is inferred if the operation of a state statute frustrates the operation of federal law.

See Comment, *A Conceptual Refinement of the Doctrine of Federal Preemption*, 2 J. PUB. L. 391, 392-93 (1973). *See generally Governmental Interests, supra* note 49.

The federal preemption decisions have been inconsistent regarding the degree of frustration or conflict necessary to infer preemptive intent. Early, the Court insisted that state law only be preempted if there was "actual conflict" between state and federal law. Savage v. Jones, 225 U.S. 501, 533 (1912). Later, the actual conflict requirement was abandoned and it was only necessary that the state law "stands as an obstacle to the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Still later, it was deemed sufficient that "the federal statute would to some extent be frustrated." Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, 722 (1963). Recently, in the labor law cases, the Court has appeared to be returning to the requirement of a larger degree of conflict or frustration and the use of the test set forth in *Hines*. *See, e.g.*, Kewannee Oil Co. v. Bicron Corp., 416 U.S. 470, 479 (1974); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 139-40 (1973). *Cf.* Catz & Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L.Q. 295, 304-09 (1977) [hereinafter cited as Catz & Lenard] (agreeing that the recent trend is toward requiring a large degree of conflict, but interpreting *Hines* as mandating an expansive federal preemption doctrine).

115. *See, e.g.*, Sears, Roebuck & Co. v. San Diego Co. Dist. Council of Carpenters, 436 U.S. 180, 188 (1978); Farmer v. United Bhd. of Carpenters Local 25, 430 U.S. 290, 304-05 (1977); Vaca v. Sipes, 386 U.S. 171, 180 (1967).

116. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

117. *Id. See also* cases cited in note 115 *supra*.

118. *See, e.g.*, Kewannee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974); Goldstein v. California, 412 U.S. 546 (1973); Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963); California v. Zook, 336 U.S. 725 (1949). *See also Governmental Interests, supra* note 49, at 495-98, 506-08, 510; Catz & Lenard, *supra* note 114, at 307-09.

The "deeply rooted in local feeling and responsibility" language has not been used in the non-labor law preemption cases no doubt because the state interests involved in those cases, although important, were not as great as the state interests at stake in the labor law cases. In all of the labor law cases, the concern deemed "deeply rooted" was the state's interest in protect-

The two factors, federal law conflict and state interest, are not given equal weight by the Court, however, when engaged in the process of inferring congressional intent.[119] It is especially clear in the labor law cases[120]

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ing its citizens from personal torts by means of entertaining civil suits. *See* note 138 *infra*. In the non-labor law cases, the state's interest has been in protecting its citizens from arguably lesser harm than that resulting from tortious behavior. For example, in *Kewanee Oil* the state interest was primarily in protecting corporations from misappropriation of trade secrets. Kewannee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974). In *Goldstein* the state concern was extending copyright protection to recordings of music. Goldstein v. California, 412 U.S. 546 (1973). In *Head* the state interest was in protecting citizens from certain advertisements. Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963). And in *Zook*, the state was concerned with protecting its citizens from inconveniences and possible physical harm resulting from shared-expense passenger transportation. California v. Zook, 336 U.S. 725 (1949).

119. *See* notes 120 & 121 and accompanying text *infra*.

120. The secondary role of state interest in inferring congressional preemptive intent is also apparent in numerous non-labor law cases. For example, in Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963), a radio station and a newspaper, located in New Mexico but serving parts of Texas as well, was enjoined by a New Mexico court from publishing advertisements of a Texas optometrist in violation of New Mexico law. The statute was alleged to be preempted by the Federal Communications Act of 1934, ch. 652, §§ 1-609, 48 Stat. 1064, 1064-1104 (1934) (current version at 47 U.S.C. §§ 151-609 (1976)) which comprehensively regulated the radio broadcast industry but did not prohibit the advertising of optometric services. The Court decided that the New Mexico legislation was not preempted for there was no "actual conflict" between the state and federal law, and there was no evidence of congressional intent to deprive the state of authority to regulate an area of such "fundamental local concern." 374 U.S. at 430, 432. It appears that the state interest was held to outweigh the national interest in this case. Nonetheless, it is clear that if actual conflict had been found, the Court would have deemed the New Mexico statute preempted.

In Perez v. Campbell, 402 U.S. 637 (1971), the Court expressly rejected the argument that the purpose of the state legislature or the interest of the state in regulation can be of controlling weight in divining congressional preemptive intent. *Id.* at 651-52. In *Perez* the Court was presented with the question whether Arizona's Motor Vehicle Safety Responsibility Act, which provides that a discharge in bankruptcy of an automobile accident tort judgment has no effect on the judgment debtor's obligation to repay the judgment creditor, was void under the supremacy clause because it conflicted with federal bankruptcy law stating that a discharge in bankruptcy fully discharges all but certain specified judgments. *Id.* at 643. Two earlier Supreme Court decisions on similar questions held that the state law was not preempted. Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962); Reitz v. Menley, 314 U.S. 33 (1941). *Kesler* concluded that a similar provision in Utah's law left "the bankrupt to some extent burdened by the discharged debt", and made "some inroad . . . on the consequences of bankruptcy." 369 U.S. at 171. Nevertheless, because the law had the purpose of "enforc[ing] a policy against irresponsible driving," and therefore effected an important state interest, the law was not preempted by the Federal Bankruptcy Act. 369 U.S. at 169, 173. *Perez* overturned *Kesler* and *Reitz*, holding explicitly that

> We can no longer adhere to [this] aberrational doctrine . . . that state law may frustrate the operation of federal law so long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all of our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objectives—that would be tangentially furthered by the proposed state law.

Perez v. Campbell, 402 U.S. at 651-52.

that only when a state has a substantial interest in regulation *and* the potential or actual conflict with federal law is small has it been inferred that Congress did not intend to preempt the state regulation.[121] Substantial conflict

121. *See, e.g.*, Sears, Roebuck & Co. v. San Diego Co. Dist. Council of Carpenters, 436 U.S. 180, 196 (1978); Farmer v. United Bhd. of Carpenters Local 25, 430 U.S. 290, 300-01 (1977); Linn v. United Plant Guard Workers Local 114, 383 U.S. 53, 61 (1966).

All of the labor law preemption cases in which the Court has found the existence of a deeply rooted state interest to lead to the conclusion that Congress did not intend to preempt the state regulation which protected that interest have arisen where it has been alleged that the conduct which the state sought to regulate was prohibited by the NLRA. Sears, Roebuck & Co. v. San Diego Co. Dist. Council of Carpenters, 436 U.S. 180, 194-95 (1978). *See* Supreme Court cases cited in note 138 *infra*. In these cases, according to *Sears*, it has been inferred that Congress did not intend to preempt the state regulation for two reasons:

> First, there existed a significant state interest in protecting the citizen from the challenged conduct. Second, although the challenged conduct occurred in the course of a labor dispute and an unfair labor practice charge could have been filed, the exercise of state jurisdiction over the tort claim entailed little risk of interference with the regulatory jurisdiction of the Labor Board.

436 U.S. 180, 196. According to the Court in *Farmer*, the legitimate and substantial interests of the state should be balanced against the potential for interference with federal law or the administration of federal law, but "concurrent state-court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme." *Id.* at 304, 305.

Justice Powell's understanding of the reason behind inferring non-preemptive congressional intent when a state's law is considered deeply rooted is that these laws are "unlikely to interfere with federal regulatory policy under the NLRA." 440 U.S. at 559 (Powell, J., dissenting).

It must be pointed out, however, that there is some authority to the contrary. Supreme Court dicta may be read to support the proposition that even in the presence of substantial conflict between state and federal law it might be inferred that Congress intended that state law not be preempted. According to the Court in Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96 (1963), "Congress under the Commerce Clause may displace state power . . . or it may even by silence indicate a purpose to let state regulation be imposed on the federal regime." *Id.* at 103-04. At first blush, this language seems to state that it can be inferred, even when intrinsic and extrinsic evidence of congressional intent is ambiguous and state law conflicts with federal law, that Congress intended to allow the state to frustrate federal law. A closer reading of this decision, and of Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), which was cited for the quoted proposition, however, indicate that such is only the case where the conflict is not actual or the frustration substantial. *Id.* at 141-43.

Similarly, language in Vaca v. Sipes, 386 U.S. 171 (1967), might be read so as to advocate the use of an "evenhanded" balancing of state interest versus frustration of federal policy to determine whether Congress intended that a state's regulation be preempted: "[T]he decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies." *Id.* at 180. Yet even in *Vaca* where the Court set forth numerous reasons which led it to infer that Congress did not intend to preempt state adjudication of certain matters, it is clear that the paramount reason that state regulation was not denounced is that there existed little possibility of conflict with federal law. *Id.* at 179, 180.

The first circuit, though, has espoused the use of an evenhanded balancing test in assessing congressional preemptive intent. Grinnell Corp. v. Hackett, 475 F.2d 449, 457 (1st Cir.), *cert. denied*, 414 U.S. 858 (1973); ITT Lamp Div. of Int'l Tel. & Tel. Corp. v. Minter, 435 F.2d 989, 992-93 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971). *Grinnell* said that when unambiguous evidence of congressional intent is lacking, a court should consider whether the state law "palpably infringe[s]" upon the federal law and, if so, whether the state interest in regulation is greater than the federal interest. 475 F.2d at 457. If the state law does not infringe or if the state interest is greater than the federal interest, then there is no preemption. *Id.* The use

with federal law leads almost inescapably[122] to the conclusion that Congress intended the state law to be preempted because Congress has the power to bar completely state regulation of certain areas.[123] In addition, a basic rule of statutory construction dictates a presumption that the legislature intends that its legislation not be denied full effect.[124]

In light of the clear Supreme Court mandate that substantial frustration of federal legislation compels the inference that Congress intended the conflicting state law to be preempted, the *New York Telephone Co.* Court failed to examine adequately the purpose of the NLRA and the extent to which New York's law frustrated that purpose. The Supreme Court has described clearly the purposes of the NLRA: "to redress the perceived imbalance . . . between labor and management,"[125] to "equitably and delicately structure the balance of power among competing forces,"[126] and to achieve nationwide

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of such a balancing test has been advocated by at least one commentator. *See* Note, *Labor Law—Preemption of State Unemployment Compensation Statute by Federal Labor Law*, 10 SUFFOLK U.L. REV. 1194, 1202-06 (1976).

The precedent upon which *Grinnell* advocated the use of such a balancing test is unclear. *Grinnell* cited Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), in support of the test, but *Southern Pacific* makes clear that state interest is only of import in deciding a preemption question if the state law does not conflict with federal law. 325 U.S. at 776. The *Southern Pacific* Court stated:

> Congress . . . will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested . . . *or* unless the state law . . . *conflicts with* . . . [an] *Act of Congress, or plainly and palpably infringes its policy.*

Id. (emphasis added). As the district court in Hawaiian Tel. Co. v. Hawaii Dep't of Labor & Indus. Relations, 405 F. Supp. 275 (D. Hawaii 1976), *cert. denied*, 435 U.S. 943 (1978), was quick to note: "There is no part in the formula for a 'balancing' of federal and state interests, as suggested by the First Circuit. . . . [The Supreme Court cases] inquire only as to whether there is a conflict between the statutes, but do not balance the interests underpinning them." *Id.* at 284 n.56.

122. It is possible, of course, that it may be clear in a given case that Congress did not intend to preempt a state law which conflicts substantially with a particular federal act. For example, the United States Warehouse Act, as originally enacted, provided: "That nothing in this Act shall be construed to conflict with . . . or in any way impair or limit the effect or operation of the laws of any State relating to warehouses, warehousemen, weighers, graders or classifiers. . . ." United States Warehouse Act, ch. 313, § 29, 39 Stat. 490 (1916) (current version at 7 U.S.C. § 269 (1976)).

123. Congress has power to exercise exclusive control over interstate commerce. *See* note 10 *supra*. Justice Holmes explained the relation between federal legislation regulating commerce and state legislation, writing in Sanitary Dist. of Chicago v. U.S., 266 U.S. 405 (1925): "This is not a controversy between equals. The United States is asserting its sovereign power to regulate commerce. . . . There is no question that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants." *Id.* at 425-26.

124. Markham v. Cabell, 326 U.S. 404 (1945); Singer v. U.S., 323 U.S. 338 (1945); Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1944). According to an expert on statutory construction: "A statute is a solemn enactment of the state through its legislature and it must be assumed that this process achieves an effective and operative result. It cannot be presumed that the legislature would do a futile thing." SUTHERLAND, *supra* note 108, § 45.12.

125. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965).

126. Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 286 (1971).

uniformity in the balance struck by Congress.[127] Moreover, Congress intended that, subject to the express prohibitions and protections of the NLRA regarding the economic weapons which parties to a labor dispute are allowed to use, parties should be free to bargain collectively and to use their respective economic strengths to reach agreements favorable to themselves.[128] The economic weakness of either party does not justify a state[129] or the NLRB[130] aiding a party by granting or denying the use of economic weapons.[131]

Whether the New York law which authorized unemployment compensation for strikers was preempted by the NLRA is, then, in the absence of unambiguous evidence of congressional intent, a question of whether it substantially altered the balance of bargaining power struck by Congress in that legislation.[132] It is clear, and the Court itself recognized,[133] that New

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127. De Canas v. Bica, 424 U.S. 351, 359 n.7 (1976); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144 (1963); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 241-44 (1959).

A Congressman has also succinctly expressed the design of the NLRA: "[T]he general purpose of the National Labor Relations Act, as interpreted by the Board and the courts, is to attempt to establish a uniform pattern of collective bargaining rules nationwide, without local variation." 120 CONG. REC. 22575 (1974) (remarks of Senator Williams).

128. H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970); American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 317 (1965); NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 489 (1960).

129. Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 149 (1976).

130. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316-17 (1965).

131. The Court in Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976), made this point clear when it stated:

> But the economic weakness of the affected party cannot justify state aid contrary to federal law for, as we have developed, "the use of economic pressure by the parties to a labor dispute is not a grudging exception [under] . . . the [federal] Act; it is part and parcel of the process of collective bargaining."

Id. at 149, *quoting* NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 495 (1960).

132. Commentators have suggested that in light of the recognized federal policy of equalizing bargaining power between unions and employers, it is illogical to insist that state neutrality in a labor dispute requires non-payment of benefits. Fierst & Spector, *Unemployment Compensation in Labor Disputes*, 49 YALE L.J. 461, 465 (1940). *Cf.* Shadur, *supra* note 4, at 299 (suggesting that some strikes deserve to be financed because of, *inter alia*, unreasonable conduct on the part of the employer). It is argued that since the employer is usually capable of greater endurance than his workers, a strictly neutral state would merely be adjusting the unequal balance if it authorized the payment of benefits to strikers. This argument fails for it proceeds on the erroneous assumption that the paramount objective of federal labor law is in some quantitative sense to make employer and employee equal adversaries in a labor dispute. It is true that the objective of labor policy is to strike a balance of bargaining power between the parties, but the balance struck was to be struck by Congress, not by the states. Both the states and the NLRB "are without authority to attempt to 'introduce some standard of properly 'balanced' bargaining power' . . . or to define 'what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining'." Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 149-50 (1976), *quoting* NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 497, 500 (1960).

133. 440 U.S. at 531-32.

York's law has substantially altered this economic balance.[134] Because the balance is altered, the federal policy of free collective bargaining is frustrated by the New York law, and it must be presumed that Congress intended to preempt the state legislation.

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134. The district court in *New York Tel. Co.* came to this conclusion after considering evidence of the impact of the New York statute on both the CWA employees' economic ability to stay out on strike longer and the petitioners' increased willingness to come to a settlement quickly. 434 F. Supp. 810, 814-19 (S.D.N.Y. 1977). A similar conclusion was rendered by another court considering similar evidence of the effect of unemployment compensation on a labor dispute. Hawaiian Tel. Co. v. Hawaii Dep't of Labor & Indus. Relations, 405 F. Supp. 275 (D. Hawaii 1976), *cert. denied*, 435 U.S. 943 (1978). The court in *Hawaiian Tel. Co.* found that:

> (1) 16.1% of the total man-days lost as a result of strikes in Hawaii between 1964 and 1973 may be attributed to the 4.8% of strikes during that period in which unemployment compensation was paid to strikers. 405 F. Supp. at 278.
>
> (2) Payment of unemployment compensation probably tends to lengthen strikes. The average length of strikes in Hawaii between 1964 and 1973 in which unemployment compensation was not paid to strikers was 29.9 days. During the same period the average length of strikes in which benefits were paid was 64.4 days. *Id.*
>
> (3) The employer's approach to bargaining is affected by the increased tax burden. *Id.* at 279.
>
> (4) Employers have been forced to settle strikes when they otherwise would not have been settled. *Id.* at 280.
>
> (5) Employee finances are key determinants of success of strikes and strike threats. *Id.*
>
> (6) During a strike, unemployment compensation provides a large percentage of a striker's income. *Id.* at 281.
>
> (7) Union members believe that unemployment compensation helps them to stay out on strike longer. *Id.*

An extensive empirical study of the effect of welfare payments on strikes came to the conclusion that welfare benefits during strikes "may well upset the relative collective bargaining positions of unions and management so greatly that the fundamental structure of collective bargaining will be seriously threatened." THIEBLOT & CORWIN, *supra* note 28, at 220.

Arguably far less significant alterations of the union-management balance of power have been deemed void by the Court for frustrating national labor policy. In Local 20, Teamsters v. Morton, 377 U.S. 252 (1964), it was held that a state could not prohibit union persuasion of a customer of a struck employer to cease doing business with the employer. *See* notes 58-62, 73-77 and accompanying text *supra*. In Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976), the Court determined that a state could not prohibit employees from refusing to work overtime during contract negotiations. *See* text accompanying notes 80-84 *supra*.

Although *Morton* and *Lodge 76* are the only cases in which a state regulation which altered the balance of bargaining power has been prohibited, on numerous occasions the Court has barred the NLRB from altering the economic balance in ways arguably less significant than compelling an employer to finance a strike against himself. For example, in NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960), the Court held the NLRB could not prohibit employees from engaging in on-the-job activities designed to harass the employer. In NLRB v. Drivers Local 639, 362 U.S. 274 (1960), the NLRB was barred from prohibiting peaceful picketing by a labor union which did not represent a majority of employees. Also, in NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952), the Supreme Court held that the NLRB could not sit in judgment upon the substantive terms of a collective bargaining agreement.

The majority, however, sought to avoid the presumption of preemptive congressional intent by stressing both the interest of the state of New York in the payment of benefits to strikers and the general nature of New York's law.[135] As has been noted, when federal policy is substantially frustrated, the Supreme Court has unmistakably commanded that state interest play no part in the divination of congressional intent.[136] Therefore, the *New York Telephone Co.* Court contradicted itself when it determined that the state interest and the nature of the state law constrained it to require compelling evidence of congressional intent to deem New York's law preempted.

Other Criticisms of the Court's Opinion

Assuming, arguendo, that state interest in regulation is of importance in inferring preemptive intent even in the presence of clear frustration of federal policy, other parts of the Court's analysis remain unconvincing because of apparent contradiction of its own precedent. In the labor law preemption cases prior to *New York Telephone Co.*, only state regulation of tortious conduct was deemed of such great state concern as to be "deeply rooted in local feeling and responsibility"[137] and accordingly to lead to the supposition that Congress did not intend to preempt state regulation of that conduct.[138] Not only is the New York interest in paying unemployment compensation to strikers not of the type previously found by the Supreme Court to be "deeply rooted," but it is also doubtful whether New York's interest is, in

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135. *See* notes 86-93 and accompanying text *supra*.

136. *See* notes 119-124 accompanying text *supra*.

137. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959).

138. 440 U.S. at 559-60 (Powell, J., dissenting). Previously, according to San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), only "the traditional law of torts" had been so classified. 359 U.S. at 247. *Accord* Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 136, 151 n.13 (1976).

Previous Supreme Court cases have held that states have "deeply rooted" interests in holding unions liable for trespass (Sears, Roebuck & Co. v. San Diego Co. Dist. Council of Carpenters, 436 U.S. 180 (1978)), for intentional infliction of emotional distress (Farmer v. United Bhd. of Carpenters Local 25, 430 U.S. 290 (1977)), for libel (Linn v. United Plant Guard Workers Local 114, 383 U.S. 53 (1966)), for threats of violence constituting malicious interference with business (UAW v. Russell, 356 U.S. 634 (1958)), for physical obstruction and threats of violence (Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957)), and for mass picketing which obstructed entrance to an exit from employer's factory (Allen-Bradley Local 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942)).

In the "public welfare" cases, that is cases in which it was contended that the payment of welfare benefits was preempted by federal labor law, the federal appellate courts have not categorized the payment of welfare benefits to citizens as a "deeply rooted" state interest. *See* Super Tire Eng'r Co. v. McCorkle, 550 F.2d 903 (3d Cir. 1977), *cert. denied*, 434 U.S. 827 (1978); ITT Lamp Div. of Int'l Tel. & Tel. Corp. v. Minter, 435 F.2d 989 (1st Cir. 1970), *cert. denied*, 402 U.S 933 (1971). Rather, *Super Tire* held that payment of welfare benefits to strikers was not inconsistent with federal labor policy, 550 F.2d at 908, and *Minter* employed a balancing process "in which both the degree of conflict and the relative importance of the federal and state interests are assessed," 435 F.2d at 992. *See* note 121 and accompanying text *supra*.

fact, substantial.[139] The *New York Telephone Co.* majority ignored the district court's finding that the New York Legislature authorized the payment of unemployment benefits to strikers more for administrative convenience than in recognition of New York's interest in the protection of the health or safety of its citizens.[140] The Court instead concluded, without citing authority, that New York had determined that the state interest in the security of persons economically affected by a strike outweighed the interest in avoiding an impact upon the labor dispute.[141] The majority found additional support for its position that New York's law should be treated as a law deemed "deeply rooted" by demonstrating that Congress was sensitive to the states' interest in fashioning their own unemployment compensation programs.[142] Although the Court showed convincingly that Congress thought it wise to leave many decisions regarding unemployment programs to the states,[143] it is a non sequitur to conclude from this congressional policy that the states

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139. New York Tel. Co. v. New York State Dep't of Labor, 434 F. Supp. 810, 818-19 (1977).

140. *Id.* The court examined the testimony of a member of the legislative advisory committee which assisted in drafting New York's unemployment compensation law and of the Director of the New York State Unemployment Insurance Division and determined that "the avowed purpose of the New York Labor Law was subverted for . . . administrative convenience." *Id.* at 818. The avowed purpose was said to be that which § 501 of the New York Labor Law, N.Y. LABOR LAW § 501 (McKinney 1977), declares: "[T]he public good . . . require[s] . . . this measure for the compulsory setting aside of financial reserves for the benefit of persons unemployed *through no fault of their own.*" *Id.* at 818 n.15 (emphasis added). Apparently the legislature felt that the administrators of the unemployment compensation fund would not have the ability to make complex determinations such as whether a person is unemployed due to a "strike or a lockout or whether a particular claimant was a striker, locked-out employee, sympathy striker, or laid off due to a strike." *Id.* at 818. The legislature, consequently, decided to give unemployment compensation to all employees whose unemployment is due to a labor dispute for ease of administration and not because of vital concerns for the health or safety of the citizens of the state. *Id.*

Also of import in the district court's determination that the payment of unemployment compensation to strikers was not a vital state interest was its consideration of a survey which indicated that strikes last two to four weeks longer in New York than in other states, and that 933,000 fewer man-days per year would be lost in New York if unemployment compensation was not available to strikers. *Id.* at 817. The court might have come to the conclusion that, on the contrary, it was in the state's interest to exempt strikers from unemployment compensation benefits. *Id.*

Supportive of the district court's conclusion that a state does not have a vital interest in paying unemployment compensation to strikers is the first circuit's decision in Grinnell Corp. v. Hackett, 475 F.2d 449 (1st Cir.), *cert. denied*, 414 U.S. 858 (1973), where its earlier decision in ITT Lamp Div. of Int'l Tel. & Tel. Corp. v. Minter, 435 F.2d 989 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971), was distinguished. In *Minter* the first circuit determined that Massachusetts had a large interest in the payment of welfare benefits to persons who qualify regardless of their status as strikers. *Id.* at 494. In *Grinnell*, however, the same court opined that the provision of unemployment benefits is "aimed at preserving the standard of living" rather than at "alleviating real hardship" as is the case with welfare benefits, and that "as to unemployment compensation for strikers, the state interest would appear somewhat narrower." *Id.* at 459-60.

141. 440 U.S. at 534.

142. *Id.* at 539.

143. *Id.* at 536-40.

have, in fact, substantial interest in paying unemployment benefits to strikers.

The *New York Telephone Co.* Court's use of the categorization of New York's law as one of general applicability to support its presumption of non-preemptive congressional intent is also in conflict with precedent. The high Court has made clear that the general purpose of a law is irrelevant in determining whether Congress intended that the statute be preempted, if the statute, in fact, frustrates federal law.[144] Only in the absence of evidence indicating the extent of state frustration of federal legislation has the Court supposed that a statute of general applicability infringes upon federal law to a lesser degree than a statute specifically designed to regulate labor relations.[145] Because the frustration of federal law effected by New York's statute is documented,[146] the question of whether the law is of general applicability is not important in divining congressional preemptive intent.[147]

It seems evident that the *New York Telephone Co.* Court has departed in numerous instances from its own rules of decision for the adjudication of

144. The Court has stated: "[I]t is well settled that the general applicability of a state cause of action is not sufficient to exempt it from preemption. 'It has not mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations.' " Farmer v. United Bhd. of Carpenters Local 25, 430 U.S. 290, 300 (1970), *quoting* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

Opinion to the contrary, however, has been registered. Concurring in Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976), Justice Powell wrote:

> I write to make clear my understanding that the Court's opinion does not, however, preclude the State from enforcing, in the context of a labor dispute, "neutral" state statutes or rules of decision: state laws that are not directed toward altering the bargaining positions of employers and unions but which may have an incidental effect on relative bargaining strength.

Id. at 156 (Powell, J., concurring).

145. According to the Court in Sears, Roebuck & Co. v. San Diego Co. Dist. Council of Carpenters Local 25, 436 U.S. 180 (1978):

> While the distinction between a law of general applicability and a law expressly governing labor relations is, as we have noted, not dispositive for preemption purposes, it is of course apparent that the latter is more *likely* to involve the accomodation which Congress reserved to the Board. It is also evident that enforcement of a law of general applicability is less *likely* to generate rules or remedies which conflict with federal labor law policy than the invocation of a special remedy under a state labor relations law.

Id. at 197 n.27 (emphasis added). The *Sears* Court also stated, however, that the crucial inquiry is whether the state law will interfere with federal law. *Id.* at 197-98.

146. *See* note 134 and accompanying text *supra*.

147. It may be that the Court's dependence upon the characterization of the New York law as one of general applicability is erroneous for an additional reason. As Justice Powell pointed out, it is difficult to think of a law which compels an employer to finance a strike against himself as a law of general applicability. 440 U.S. at 557 (Powell, J., dissenting). Section 592.1, N.Y. LABOR LAW § 592.1 (McKinney 1977), the only section of the statute being challenged by the petitioners, specifically adjusts the collective bargaining balance of power by providing a special eligibility rule for strikers. It does, in fact, appear to be a law which regulates directly the relations between employees, their union, and their employer.

claims that state law is preempted by federal law when extrinsic evidence of the intent of Congress is lacking or inconclusive. Although it may be the case that *New York Telephone Co.* continues a recent line of Supreme Court opinions which have reflected tolerance of state law which touches upon federal law,[148] the instant decision, unlike the recent preemption cases,[149] has been solicitous of state legislation at the expense of some of the basic rules of federal preemption.

THE IMPACT OF *NEW YORK TELEPHONE CO.*

The impact of *New York Telephone Co.* upon the law of federal preemption is questionable due to the fact that five Justices expressly disagreed with the majority's use of the presumption of non-preemptive congressional intent.[150] Because these Justices asserted, on the contrary, that preemptive intent must be presumed if state law operates to frustrate federal policy objectives, *New York Telephone Co.* may not necessarily effect a radical change in the law of federal preemption.

On the other hand, because six Justices placed emphasis upon Congress' expressed intent in concluding that Congress intended that the states be free to pay unemployment compensation to strikers,[151] *New York Telephone Co.* is clearly dispositive of the validity of state statutes such as New York's. By the broad and unqualified language of the decision it would appear that all of the state provisions currently in force which pay benefits to strikers under varying circumstances[152] would be upheld in subsequent litigation. This

148. Prior to 1973, a Supreme Court decision had made clear that federal law is absolutely supreme, and that any state law which conflicts with or frustrates the *full* effectiveness of federal law is invalid, regardless of state interest in regulation. *See* Perez v. Campbell, 402 U.S. 637, 651-52 (1971); note 120 *supra*. The Burger Court, however, has recently evinced a tendency to interpret the effect of federal and state statutes so as to eliminate or minimize apparent conflict between state and federal laws in terms or operation. *See, e.g.*, Kewannee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973). *See also* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and The Burger Court*, 75 COLUM. L. REV. 623, 639-51 (1975) [hereinafter cited as *Shifting Perspectives*]. The Burger Court also has allowed acknowledged conflict between state and federal law to stand when it viewed the conflict to be "merely trivial or insubstantial" (New York Dep't of Social Serv. v. Dublino, 413 U.S. 405, 423 n.29 (1973)), or "peripheral" (Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 135 (1973)), to the federal act's main purpose. In this way the Court has recognized and protected what it considered to be important state interests. *See Shifting Perspectives, supra* at 639. Yet the Burger Court has reaffirmed that a law which stands "as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress" is void. Kewannee Oil Co. v. Bicron Corp., 416 U.S. 470, 479 (1974), *quoting* Hines v. Davidowitz, 312 U.S. 52, 67 (1941). In none of the prior decisions has the Court admitted, as the Court in *New York Tel. Co.* has implicitly done, that the state law in question substantially frustrated a central purpose of a federal law and still found the state statute to be valid.

149. *See* note 148 *supra*.

150. Justices Blackmun, Marshall, Powell, Stewart, and Burger.

151. Justices Stevens, White, Rehnquist, Brennan, Blackmun, and Marshall.

152. *See* note 5 *supra*.

hypothesis stems from the fact that all but one[153] of the states which pay unemployment compensation to strikers do so under more limited circumstances than does New York.[154]

One result of the *New York Telephone Co.* decision may be that Congress will be led to consider whether payment of such benefits should be expressly prohibited.[155] Although amendments to accomplish this have been suggested in the past,[156] they have not been considered by either the full House of Representatives or the Senate. It is debatable whether an amendment which would disqualify strikers from receiving benefits would be passed by Congress. As the *New York Telephone Co.* majority pointed out,[157] Congress has expressed its view that the states should be largely unrestrained in designing their unemployment compensation programs. It is unclear whether this policy would be applied by a majority of Congressmen to foreclose the enactment of such an amendment. If the views of the majority of state legislatures were those of Congress, however, an amendment disqualifying strikers might well be enacted. In light of the demonstrated effect of the payment of unemployment compensation to strikers on the duration and outcome of strikes,[158] it may well be that the enactment of such an amendment is desirable.

The *New York Telephone Co.* decision left open questions regarding the scope of its application that could become important in future litigation. If a

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153. Rhode Island pays unemployment compensation to strikers under almost the same circumstances as New York. *See* note 5 *supra*.

154. Payment of benefits to strikers if a strike resulted from an employer's violation of a union contract, if the strikers are protesting dangerous conditions, if a striker has been laid off from a subsequent job, or if the strike resulted from the employer's violation of the law, are all arguably more limited circumstances than the payment of full benefits after a waiting period. *See* note 5 *supra*.

155. It is doubtful that the states will amend their statutes to provide benefits for strikers as a result of *New York Tel. Co.* because the states exempted strikers from receiving unemployment compensation for reasons other than fear of conflict with federal labor law. *Cf.* Shadur, *supra* note 4, at 296-300 (discussing theories justifying the labor-dispute disqualification, but not mentioning fear of conflict). One of the reasons given by the states for denying strikers the right to receive benefits is the public policy determination that compensation should only be given to those persons involuntarily unemployed. *See, e.g.*, McKinley v. California Employment Stabilization Comm'n, 34 Cal. 2d 239, 209 P.2d 602 (1949); Caterpillar Tractor Co. v. Durkin, 380 Ill. 11, 42 N.E.2d 541 (1942). Another reason is the notion that states should not side with one party or the other in a labor dispute. *See, e.g.*, Matson Terminals, Inc. v. California Employment Comm'n, 24 Cal. 2d 695, 151 P.2d 202 (1944); Bankston Creek Collieries, Inc. v. Gordon, 399 Ill. 291, 77 N.E.2d 670 (1948); Lawrence Baking Co. v. Michigan Unemployment Compensation Comm'n, 308 Mich. 198, 13 N.W.2d 260 (1944). A further reason is the feeling that it is fundamentally unfair to force an employer to finance a strike against himself. *See, e.g.*, Local Union 11 v. Gordon, 396 Ill. 293, 71 N.E.2d 637 (1947); Muncie Foundry Div. v. Review Bd., 114 Ind. App. 475, 51 N.E.2d 891 (1943). In all likelihood the state legislatures still feel these reasons for denying unemployment compensation to strikers to be valid.

156. *See* note 99 *supra*.

157. 440 U.S. at 537 n.28.

158. *See* note 134 *supra*.

state, such as New York, were to provide even more liberal benefits to strikers, the question of federal preemption of state unemployment compensation programs could again arise. As the dissent in *New York Telephone Co.* pointed out, the majority opinion gave no guidance in regard to whether a hypothetical state unemployment compensation program would be allowed to alter the balance set up by Congress to such an extent that federal labor law would be rendered totally inoperative.[159] If a state statute provided 100% of a striker's wage in benefits financed 100% by the struck employer's contributions, the balance of bargaining power established by Congress in the NLRA would become meaningless. A worker receiving such benefits would be ambivalent regarding whether or not a strike was settled, and could therefore hold out indefinitely in support of his or her demands. Of course, the enactment of such a law is extremely improbable. Yet the hypothetical existence of statutes which pay higher percentages of a worker's salary, for a longer period of time, funded to a larger degree by the struck employer, raises questions as to the precedential limit of *New York Telephone Co.* If such a statute is one day enacted, and its validity under the NLRA litigated, the question whether the Court's decision in *New York Telephone Co.* has "open[ed] the way for [a] State tc undermine completely the collective bargaining process within its borders"[160] will have to be answered.

CONCLUSION

The *New York Telephone Co.* decision is perhaps particularly notable for the confusion which it introduces into the law of federal preemption. Although it has been observed that the Supreme Court has not developed a uniform approach to preemption and that the Court's preemption decisions often take on an unprincipled and ad hoc quality,[161] the Court consistently has voided state statutes which substantially conflict with federal law, in the absence of evidence of contrary congressional intent. With the advent of *New York Telephone Co.*, however, it is not clear that even this longstanding principle is safe from the changing views of the Court's members. Because federal preemption doctrine is so dependent upon changing conceptions of the relationship between the states and the federal government, perhaps it is not surprising that all aspects of the doctrine should be noted for inconstancy, rather than for stability. Nevertheless, the principle that preemptive congressional intent is presumed where the operation of federal law stands to be frustrated by state law is a tenet derived from both the supremacy clause and logic and should not be lightly disregarded.

James Warchall

159. 440 U.S. at 565 (Powell, J., dissenting).
160. *Id.* at 566.
161. *Shifting Perspectives*, *supra* note 148, at 624.